

Mr. Hermann Rosenblatt  
Excise Tax Unit

September 29, 1989

Janet Vining  
Legal

Quasi-Federal Government Entities  
California National Guard

This is in response to your memorandum dated July 31, 1989, requesting an opinion concerning whether the California National Guard should be treated as a federal entity for purposes of the California hazardous and toxic waste fees.

The National Guard has claimed an exemption from the generator fee, the Superfund tax, and the disposal fee. In a March 7, 1989 letter to the Board, [redacted], [redacted] of the California Military Department's Office of the Adjutant General, stated that all of the California Military Department sites generating more than five tons of hazardous waste are Army National Guard facilities owned or operated by the federal government. [redacted] argued that the federal government has not waived its immunity from paying generator fees and therefore no payment is due. [redacted] also wrote a May 19, 1989 letter to the Board in which he stated that the National Guard was exempt from payment of the hazardous waste disposal fee, asserting that "forty-four of the forty-five hazardous waste generator sites reported by (the California Military Department) are operated by the federal government, and the remaining site is owned and operated by the California Military Department and is subject to the payment of hazardous waste taxes." On June 23, 1989, Bob Frank wrote to Mr. [redacted], requesting information as to what agency operated each of the 44 sites during the past three years. On July 24, [redacted] again wrote the Board protesting a billing for the hazardous waste disposal fee. He did not offer the information requested in Bob Frank's earlier correspondence, but noted that the "Federal Government will respond to the inquiry." To date, it has not.

The California Air National Guard also received a billing for the Superfund fee, and Mr. [redacted] responded, asserting that the Air National Guard did not have to pay the

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fee, because "hazardous waste fees assessed by California on federal facilities are unconstitutional." The Board's notice of assessment was returned with the following notation: "We are a federal agency and not subject to taxation."

The California National Guard is an interesting animal -- part state and part federal. My research indicates that it is actually two armies in one, and that a given unit's status as a state unit or federal unit depends on whether the unit has been called to federal duty.

Article I, Section 8, Clause 12 ("the Armies Clause") of the U.S. Constitution gives Congress the power "to raise and support Armies ...." Article I, Section 8, Clauses 15 and 16 (referred to jointly as the "Militia Clause") gives Congress the power to:

...provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organization, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

The term "National Guard" refers to two overlapping, but legally distinct, organizations. Under the Armies Clause, Congress created the National Guard of the United States, a federal organization comprised of state National Guard units and their members. These state units also maintain an identity as state National Guards, as part of the militia described in the Militia Clause. (Perpich v. U.S. Dept. of Defense, 666 F.Supp. 1319 (D. Minn. 1987).) This "dual-enlistment" system was crafted by Congress in 1933<sup>1</sup> when the National Guard became a reserve component of the regular Army, known as the National Guard of the

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<sup>1/</sup> The history of this country's armed forces is described in Dukakis v. U.S. Dept. of Defense, 686 F.Supp. 60 (D. Mass. 1988), Perpich v. U.S. Dept. of Defense, 666 F.Supp. 1319 (D. Minn. 1987), and State v. Johnson, 202 N.W. 191 (Wisc. 1925).

United States.<sup>2</sup> Every member of the National Guard is therefore a reservist as well as a member of the militia, and must take an oath of allegiance to both the state and federal governments. (See, generally, Tit. 32, U.S. Code.)<sup>3</sup>

"Federal recognition" is the action taken by the Department of the Army in acknowledging and recording that the officers and members of an Army National Guard unit have met certain qualifications and requirements prescribed by the National Defense Act and applicable regulations. (32 U.S.C. 105, 301.) As a result of federal recognition, a state National Guard unit receives federal aid and qualifies as a unit of the National Guard of the United States, subject to being called into federal service by the President, through orders issued by the state governor. (10 U.S.C. 3500.) From the time they are called into federal service, the members and units become part of the Army National Guard of the United States (10 U.S.C. 3497), and are subject to Army laws and regulations (10 U.S.C. 3499).<sup>4</sup>

In time of war or national emergency declared by Congress, the Secretary of the Army may order any Guard unit to active duty (other than training) for the duration of the war or emergency and six months thereafter. (10 U.S.C. 672(a).) In addition, the Guard can be ordered to active duty at any time for up to fifteen days a year, with the consent of the state's governor. (10 U.S.C. 672(b).) However, the governor cannot

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2/ Although the National Guard of the United States is a reserve component of the U.S. Army, its role in the nation's military readiness program should not be underestimated. Today, 18 of the 24 total Army divisions available in the event of war would be provided in whole or in part by the Army National Guard. Perpich v. U.S. Dept of Defense, supra at 1323.

3/ The federal statutory provisions contain similar references to the Air Force National Guard, and the use of the term "National Guard" in this memorandum is meant to include both the Army National Guard and Air Force National Guard.

4/ Federal recognition can be revoked if a National Guard unit does not comply with the federal requirements. (32 U.S.C. 108.) However, the authority of the state governor to act as commander-in-chief of a Guard unit as a state force is not limited by the fact that a specific action taken by the governor could cause a withdrawal of federal recognition. (11 Ops. A.G. 253, May 25, 1948.)

withhold consent with regard to active Guard duty outside the United States because of any objection to the "location, purpose, type, or schedule of such active duty." (10 U.S.C. 672(f).)<sup>5</sup>

State statutory provisions concerning the National Guard appear in the California Constitution and Military and Veterans Code. Article 5, Section 7 of the California Constitution states that the Governor is the commander-in-chief of a militia that shall be provided by statute, and the Governor may call forth the militia to execute the laws of the state. The California National Guard is part of the California Military Department. (Mil. and Vet. Code, §§ 50, 51.) The Governor, as commander-in-chief of the Guard, may create, disband or reorganize Guard units, and order the Guard to perform military duty (Mil. and Vet. Code, §§ 140, 142, 211).

Although the California National Guard is organized pursuant to the California Constitution and codes, the Guard is governed according to federal laws and rules relating to the control and administration of the United States Army, so far as those rules are not inconsistent with the rights reserved to the state under the U.S. Constitution (Mil. and Vet. Code § 101). The California National Guard follows the system of discipline and court-martial procedures of the United States Army (Mil. and Vet. Code §§ 360, 451). Officers are appointed in the manner provided by Army laws and regulations, and Guard members, although paid by the State, receive the same pay as their counterparts in the Army (Mil. and Vet. Code §§ 220, 320, 321, and 324). Where the Army's rules and regulations are silent, matters relating to the organization, discipline, and government of the National Guard are decided according to the custom and usage of the U.S. Army (Mil. & Vet. Code § 361). Federal law also provides that the training, discipline, uniform, arms and equipment of the National Guard will conform to that of the Army. (32 U.S.C. §§ 501, 701.)

Under the "dual-enlistment" system described above, a member of the California National Guard is a member of the state

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<sup>5/</sup> In Dukakis v. U.S. Dept. of Defense, supra, the Governor of Massachusetts unsuccessfully challenged Section 672(f) as an unconstitutional violation of the militia clause of the U.S. Constitution. Governor Dukakis sought to withhold his consent to sending Massachusetts National Guard units to Central America for a training mission. See also, Perpich v. U.S.

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militia and the federal army reserve at the same time. The status of members of the Guard in specific situations has been discussed by several courts in cases where Guardsmen sought compensation for injuries under state or federal law. In these cases, the courts' decisions turned on whether the National Guard unit had been called to federal service at the time of the accident.

In Sadowski v. State of N.Y., 51 Misc. 2d 832 (1966), a member of the National Guard was injured when he slipped on a stairway while attending a regularly-scheduled drill of his unit. The court ruled that, even though the Guardsman was paid by the federal government, his unit had not been called to federal service at the time of the accident, and the state workers compensation law therefore applied. (See also State v. Johnson, supra, for a similar holding when a Guardsman was injured at target practice.) In Mancini v. Rhode Island National Guard, 271 A.2d 297 (R.I. 1970), the plaintiff Guardsman died in an auto accident which occurred during authorized leave after the President had ordered the Guardsman's unit to active federal duty. The Court dismissed a lawsuit brought by the Guardsman's parents for survivor benefits under state law, holding that federal laws governing the U.S. Army were applicable because the unit had been called to federal duty.

In Gross v. U.S., 177 F.Supp. 766 (E.D., N.Y., 1959), the plaintiff sued under the Federal Tort Claims Act for injuries she received when she tripped over a rope at an open house review of a New York National Guard unit. The Court rejected the plaintiff's argument that the Guard members were federal employees acting within the scope of their employment, since the "law is well settled that members of the National Guard of the various states are state employees except when in the actual service of the United States."

In Zitsen v. Walsh, 352 F.Supp. 438 (D. Conn. 1972), a Connecticut National Guard member ousted from officer candidate school, allegedly because of his opinions concerning military practice, brought an action under 42 U.S.C. Section 1983 for a violation of his freedom of speech. The Court held that the lawsuit could be maintained in federal court, since the conduct of the National Guard constituted the action under "color of

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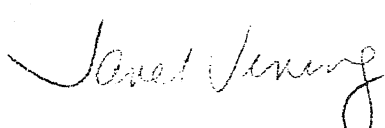
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Dept. of Defense, supra, where the Governor of Minnesota asserted the same arguments, with the same result.

state law" required to assert jurisdiction under 42 U.S.C. Section 1983.

The above cases make clear that, unless specifically called to federal service, a unit of the National Guard is a state entity. Toxic or hazardous waste is most likely generated by the California National Guard units while they are engaged in training. The training of a state National Guard unit is a function reserved to the state. Emsley v. Army National Guard, 722 P.2d 1299 (Wash. 1986) -- state may require university students to receive military training; and Dukakis v. U.S. Dept. of Defense, supra.

While the federal government has assumed constantly increasing responsibility for, and exercised increasing control over, the organization and discipline of the National Guard, the Guard is only a potential part of the United States Army, and does not in fact become a part until called into federal service. State v. Johnson, supra; United States v. Dern, 74 F.2d 485 (D.C., D.C. 1934). "The National Guard, while something of a hybrid under both state and federal control, is basically a state organization" Mela v. Callaway, 378 F.Supp. 25 (S.D., N.Y. 1974).

I therefore conclude that the California National Guard is a state organization, and fully subject to the laws of the State of California, including the payment of any fees required to be paid because of the generation, treatment, storage, or disposal of toxic or hazardous waste, unless and until any specific unit is called into federal service. However, should the federal government provide the information requested by Bob Frank, or should the California National Guard seek and obtain an opinion from the U.S. Attorney General indicating that the Guard is immune from imposition of the fees, I would reconsider the issue in light of such information.



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